

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

(attached copy)
77-1324

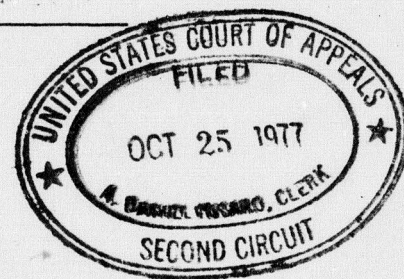
To be argued by
IVAN S. FISHER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
Appellee, :
-against- :
FRANK MOTEN, :
Appellant. :
-----X

B
p/s

BRIEF FOR THE APPELLANT FRANK MOTEN



IVAN S. FISHER
Attorney for Appellant
400 Park Avenue
New York, New York 10022
(212) 355-2380

JOSEPH H. ADAMS
Law Clerk

TABLE OF CONTENTS

	<u>Page</u>
Introductory Statement	1
Statement of the Case	1
Point I -	
The Appellant Is Entitled To A Hearing On His Motion For A New Trial	6
Point II -	
The Appellant Has Made A Sufficient Evidentiary Showing To Be Entitled To Discovery	18
Point III -	
The Government Has The Burden Of Justifying The Sealing Of Proceedings Incident To The Keno Prosecution	49
Conclusion	50

TABLE OF CASES

	<u>Page</u>
<u>Clark v. United States</u> , 289 U.S.1 (1933).....	35, 36, 37
<u>Mattox v. United States</u> , 146 U.S. 140 (1892).....	6, 25, 33
<u>Parker v. Gladden</u> , 385 U.S. 263 (1966).....	33
<u>Remmer v. United States</u> , 347 U.S. 227 (1959).....	6, 10, 49
<u>In re Grand Jury Subpoena to David Doe</u> , _____ F.2d _____ (2d Cir. 1977).....	15, 32
<u>Miller v. United States</u> , 403 F.2d 77 (2d Cir. 196).....	22, 33, 40
<u>Southern Pacific Co. v. Klinge</u> , 65 F.2d 85 (10th Cir.1933)	39
<u>United States v. Allied Stevedoring Company</u> , 258 F.2d 104 (2nd Cir. 1958).....	12
<u>United States v. Gersh</u> , 328 F.2d 460 (2nd Cir. 1964).....	40, 45, 47
<u>United States ex rel. Owen v. McMann</u> , 435 F.2d 813..... (2nd Cir. 1970).....	39
<u>United States v. Pleug</u> , 66 F.2d 529 (2nd Cir. 1933).....	33
<u>United States v. Puco</u> , 476 F.2d 1099 (2nd Cir. 1973).....	14, 26
<u>Wheaton v. United States</u> , 133 F.2d 522 (8th Cir. 1943)...	6
<u>United States v. Driscoll</u> , 276 F.Supp 333 (SDNY 1967)...	40

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA, :

Appellee, :

-against- :

Dkt No. 77-1324

FRANK MOTEN, :

Appellant. :

-----X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT FRANK MOTEN

Introductory Statement

Frank Moten appeals from an order of the United States District Court for the Southern District of New York, on June 3, 1977, after a hearing before the Honorable Richard Owen, denying the Appellant's post-trial motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, and for discovery incident thereto.

Statement of the Case

Frank Moten, along with 21 co-defendants, was convicted

on January 21, 1977, in the Southern District of New York, for violating and for conspiring to violate the Federal Narcotics Laws.

During this trial, a juror attempted to make contact with one of the Appellant's co-defendants, Sebastian Intersimone. This incident occurred while Intersimone met with his lawyer in an office on lower Broadway. Yolanda Intersimone, while waiting outside for her brother, was approached in the street by juror Keno. (B-8).

According to an affidavit filed in support of the instant motion by David Keegan, Intersimone's lawyer, that reported the account made by Ms. Intersimone immediately after her encounter with Keno, the following exchange took place:

Mr. Keno: [Are you] Mr. B's wife?

Ms. Intersimone: No, I'm Benny's sister.

Mr. Keno: It doesn't matter. I have a message for Mr. B.

Ms. Intersimone: My God, you're a juror, don't you know we are not supposed to be talking, this is very dangerous.

Mr. Keno: O.K., I'll get the message to him myself.

Ms. Intersimone: Tell Mr. B to meet me Monday at the noon hour on Broadway.

(B-8,9)

After delivering this message, Keno walked down the street to where another juror was waiting for him and the two

jurors walked away together. (B-9,10).

These events occurred on Friday, September 17, 1976. The next Monday morning, Intersimone's lawyer informed the District Court in camera of what Keno had done and said. (E-2,3) Mr. Keegan additionally informed the Court that sometime prior to the Keno incident, Bernard Brightman, one of the co-defendants at the Appellant's trial, had approached Intersimone to tell him that "there was a possibility of bribing one of the jurors." (E-3).

Immediately after the District Court learned of these events, it interviewed Yolanda Intersimone and Keno. (B-9). Immediately after these interviews, the District Court dismissed Keno from the jury. (F-4194)

This incident created a major crisis in the administration of what was already a complex mass conspiracy trial. After reporting Keno's dismissal in open Court, the District Court voir dired the jury and asked two questions:

- (i) Whether they had been discussing the merits of of the case among themselves,
- (ii) Whether they had had such discussions with anyone outside the jury.

(F-4211).

All the jurors answered 'no' to these questions. Of course, when these jurors were voir dired, none of them yet

knew of Keno's dismissal. None were asked if they knew of Keno's efforts to "communicate" with any of the defendants. None of these jurors were asked whether they had seen Keno the previous Friday. Indeed, the voir dire was carefully fashioned to divert the jurors' attention from Keno. (F-4201).

The transcripts of the Court's voir dire are a public record. Virtually all other proceedings involving the Keno incident have been sealed. No investigation of the events underlying Keno's dismissal has ever been conducted in public. Indeed, Keno has been prosecuted by the government, but all records incident to that prosecution are sealed, and as of this filing, continue to be sealed.

After marshalling the available evidence, Moten sought a new trial, alleging that "the stain of corruption may well have tainted the verdict, because other jurors either were involved in, or were aware of, Keno's corrupt scheme." (A-4). Moten's request to inspect the Government's sealed records concerning Keno and to interview jurors have all been denied.

This appeal, from the District Court's refusal of these requests, primarily raises questions of evidence and procedure. However, the real issue on this appeal is whether the jury

that convicted Frank Moten was tainted by the corrupt acts of individuals inside and outside the jury. The evidence existing strongly suggests that Keno was not a lone figure. —

The Appellant respectfully submits that the critical question underlying this appeal is whether anyone but the Government is entitled to know how, and in what way, Keno interfered with the jury that convicted Frank Moten.

POINT I

THE APPELLANT IS ENTITLED TO A HEARING ON HIS
MOTION FOR A NEW TRIAL.

- A. The trial record discloses facts sufficient to entitle
Appellant to an evidentiary hearing.

The Appellant Frank Moten has made an evidentiary showing sufficient to entitle him to a hearing pursuant to his motion for a new trial.

It is well-established law that, once it is shown that jurors have had improper contact with persons outside the jury, a District Court must conduct a hearing to determine the scope, if any, of the resultant prejudice.

In Remmer v. United States, 347 U.S. 227, 229 (1959), a jury foreman, after receiving an implicit offer of a bribe, immediately communicated that fact to the trial judge. In reversing the defendant's conviction because the trial court failed to provide any hearing as to the possibly prejudicial effects of this offer, the Supreme Court remarked:

In a criminal case, any private communication, contact, or tampering, directly or indirectly, with the juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, ...the presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. Mattox V. United States, 146 U.S. 140, 148-150; Wheaton v. United States, 133 F.2d 522, 527.

In the midst of Moten's trial, counsel for the Appellant's co-defendant, Sebastian Intersimone, advised the District Court that a juror had attempted to make contact with his client under circumstances clearly suggesting the solicitation of a bribe. The District Court dismissed that juror and continued the trial. (F-4194). Additionally, the Court was told that the defendant whom Keno attempted to approach had himself been approached some time earlier by another co-defendant, Bernard Brightman, who had informed him that "there was a possibility of reaching one of the jurors." (E-3). Informed of this possibility, Intersimone allegedly made, according to the account of Intersimone's attorney to the District Court, an "inappropriate response" (E-3).

These facts clearly establish, that the juror Keno attempted a "private communication" with the co-defendant Intersimone and that some juror -- either Keno or another -- at some time prior to September 20, 1976, when Keno was dismissed, had made a separate criminal solicitation.

Solely on the basis of these facts, all known to the District Court at the time of Keno's dismissal, the appellant is entitled to a hearing to determine whether contacts between some of Moten's co-defendants and the jury invalidated the convictions that resulted from its deliberations.

In the instant case, at least three distinct

possibilities of prejudice exist. First of all, it is possible that during that period of time after the clearly impermissible and probably criminal contact with the defendant Brightman, a juror -- whether Keno or another -- had begun a campaign to secure the acquittal of some or all of the defendants. Secondly, it is possible that those jurors remaining on the jury learned, or surmised, the reasons for Keno's dismissal and were prejudiced thereby. Finally, if Keno had co-conspirators among his fellow jurors, it is possible that these jurors -- in order to exculpate themselves from their own culpability -- would campaign vigorously for convictions regardless of the merits of the Government's prosecution.

In light of Remmer, the District Court was required to recognize that these possible interferences with the jury's deliberations presumptively created a prejudice invalidating Appellant's conviction.

The only significant factual distinction between Remmer and the instant case is that there a juror who had indisputably been contacted was permitted to remain on the jury. The question of prejudice concerned only the impact of the anonymous approach upon that single juror.

In Remmer, however, it appears that the juror in question immediately advised the trial court and thus no real question as to the spread of taint to other jurors was

raised. Here, the solicitation of Intersimone occurred approximately one week prior to attorney Keegan's disclosure to the District Court.

Here, the prejudicial impact suffered must be determined as a response to questions like the following:

How much damage did Keno do?

How many of Keno's co-jurors became implicated or prejudiced by what Keno had been attempting to accomplish?

To what extent did Keno impair the impartiality of other jurors?

The presumption, absent contrary proof from the Government, must be that the jury of which he was briefly and unfortunately a member was fatally prejudiced by his activities.

This analysis was not adopted by the District Court:

The only basis for urging upon me an inquiry into the issue of whether the jury that convicted Intersimone and Moten were aware of the reasons for Keno's dismissal from the jury, or whether another jury member may have been complicit with independently involved in an attempt to corrupt the jury process, is in the form of hearsay affidavits made by counsel relating what they were told by certain others...Such a hearsay showing is insufficient to call for a hearing. (D-3,4)

Regardless of what representations were made by the attorneys representing Moten and Intersimone, and regardless of in what form, a legally sufficient factual predicate for the Appellant's request to be granted a hearing was disclosed during trial. Moten had only to produce the transcript of the

Court's colloquy with defense counsel immediately preceeding the voir dire of the jury that followed Keno's dismissal. (F-4194-4196) to be entitled to a Remmer hearing.

B. The District Court improperly made ex parte findings of fact.

The District Court's ex parte proceedings in which it evaluated appellant's factual allegations were clearly improper. Such inquiry can only be made within the context of an adversary proceeding.

In Remmer, the trial court made an ex parte determination that no prejudice had resulted from an anonymous contact with the jury's foreman, without informing the defendant that the incident had even taken place. The Supreme Court stated:

We do not know from this record, nor does the petitioner know what actually transpired or whether the incidents that may have occurred were harmful or harmless...the trial court should not decide and take final action ex parte...but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all the interested parties permitted to participate.

Id. at 229-30 (emphasis added)

Repeatedly, the District Court here has resorted to ex parte proceedings. When Moten's co-defendant Intersimone raised issues now raised by Moten, the District Court responded

to Intersimone's request for a hearing by asserting:

If a showing were made to me which it is not at this point*, that any other juror or jurors had been affected, I would then be in a different position.

Further, it would seem to me that if the Government develops anything in the Grand Jury leading to show that other jurors were in fact effected, there is an obligation upon them, and I place an obligation upon them, to bring that certainly to my attention in the first instance. G-31.

At the oral argument on Moten's application, the Government likewise offered to participate in only ex parte proceedings:

The only thing on this particular issue that remotely touches the question is the hearsay affidavit of Mr. Keegan...in connection with that issue I would like to submit some Grand Jury minutes in camera ex parte...I guess, as they are sealed, but they do reflect on the validity of the showing of what's contained in that affidavit...and whether the Court should consider that as sufficient on the matter of holding a hearing, and with the Court's permission I would like to do that. H-49.

Both the Government's and the District Court's predilection to exclude Appellant from factual hearings cannot be countenanced-- particularly when it is the

* Intersimone argued this point immediately prior to his sentencing on January 31, 1977 before the affidavits filed by Moten in support of his request for discovery were presented to the District Court.

Government, not Moten, which must prove that the Appellant has suffered no prejudice from the Keno affair. Remmer's allocation of evidentiary burdens is clearly designed to give defendants an invaluable procedural advantage in litigating the type of claim Moten now raises. That advantage cannot be nullified by denying appellant the additional safeguard of an adversary proceeding.

C. Appellant's Supplementary Factual Submission Mandate a Remmer Hearing.

Any legal insufficiency in the evidence adduced at trial is cured by the factual submissions accompanying Moten's instant motion.

Appellant has submitted affidavits by the jury's forelady and by two attorneys. Ignoring the first-hand affidavits of the forelady, Ms. Blau, and its own trial record, the District Court held that the "only basis" for Moten's requests were the "hearsay affidavits by Intersimone's trial attorney, David Keegan, and Moten's appellate attorney, Ivan Fisher." (D-3), and that his "hearsay showing is insufficient to call for a hearing." (D-3,4)

This legal conclusion cannot withstand scrutiny. Even the case cited in support thereof, United States v. Allied Stevedoring Corp., 258 F.2d 104 (2d Cir.) cert. denied, 358 U.S. 841 (1958), is poor authority for the Court's conclusion. In that case, the defendant's factual submissions,

in addition to being hearsay, did not make allegations legally sufficient -- even if they had been alleged as a matter of first-hand knowledge -- to entitle him to any relief. The District Court regarded this as "most important". Supra, at 106.

The affidavits of Messrs. Keegan and Fisher clearly allege facts of legal significance. In an affidavit dated February 18, 1977, Mr. Fisher alleged, upon information and belief, that "juror Keno was not alone when he approached Intersimone's sister but that he approached Intersimone's sister in the company of one other trial juror." (A-6;) and that "upon at least one occasion, juror Keno approached the relative of yet another defendant in this case, seeking money for jurors other than himself" (A-7) (emphasis supplied); and that "Intersimone's sister had, in fact, already disclosed information to the Government which suggest that another juror may well have been involved". (A-6) (emphasis supplied)

Mr. Keegan alleged that Yolanda Intersimone noticed that Keno was not alone the day that he approached her, but that "he had been speaking with another juror, left that juror to talk to Ms. Intersimone, and then rejoined that other juror and [they] both left the area together" (B-3,4). Moreover, Mr. Keegan swore that Ms. Intersimone "felt that she could not say positively which juror had been with Keno but she believed it was one of the Hispanic jurors, either number 2 or number 8"

but that being "unable to positively identify the person who had been with Keno and rather than identify the wrong person, she said she could not identify the other person". (B-10).

These allegations, if true, clearly show that the conspiracy to which Keno was a party included other jurors. At least one other juror knew of Keno's approach to Yolanda Intersimone. If these allegations are true, presumptively prejudicial contacts between some jurors and some defendants then on trial had actually taken place. If these facts could be established in an adversary hearing, it is indisputable that Appellant's conviction would have to be vacated.

That these allegations are made only in hearsay affidavits is not, by itself, an adequate grounds for denying Moten the Remmer hearing to which he is otherwise entitled. Hearsay declarations are competent evidence where there are sufficient indicia of reliability. United States v. Puco, 476 F.2d 1099, 1104 (2d Cir. 1973).

Such indicia are not lacking in the instant case. First of all, both of the affidavits in question are submitted by attorneys who are officers of this Court, thus providing assurance at least that the affidavits reflect what was actually said to the affiants.

Secondly, the declarant's allegations, without exception, are made under circumstances that belie any

Government challenge that they are not truthful. For instance, Brightman's alleged disclosure that a juror could be bribed was conveyed as a confidence incident to an anticipated criminal venture. The likelihood that one defendant would gratuitously make such a representation to one of his co-defendants is minimal.

Certainly, Intersimone's attorney gave credibility to this report, since he ordered his client to disassociate himself from this venture. Additionally, Mr. Keegan thought the disclosure of sufficient import that he reported Brightman's remark to the Court (E-3), when in doing so he ran substantial risk of jeopardizing his professional status as an attorney. See, In re: Grand Jury Subpoena to David Doe, _____ F.2d _____ (2d Cir. 1977).

By contrast, Ms. Intersimone's disclosures gained credibility by dint of her concern for the impropriety of Keno's approach as disclosed by her prompt report of the event to her attorney, and by her cooperation with the District Court that lead ultimately to Keno's dismissal.

Nevertheless, the District Court denied a hearing because of the hearsay basis of Moten's allegations. This ruling is exquisitely ironic. Denied post-trial access to the jurors, and denied a hearing in which he would have the opportunity to exploit the Court's subpoena power to compel

the actual declarants testify, Moten must rely on hearsay affidavits. At the very least, the District Court should have permitted a hearing initially limited to the testimony of these three witnesses.

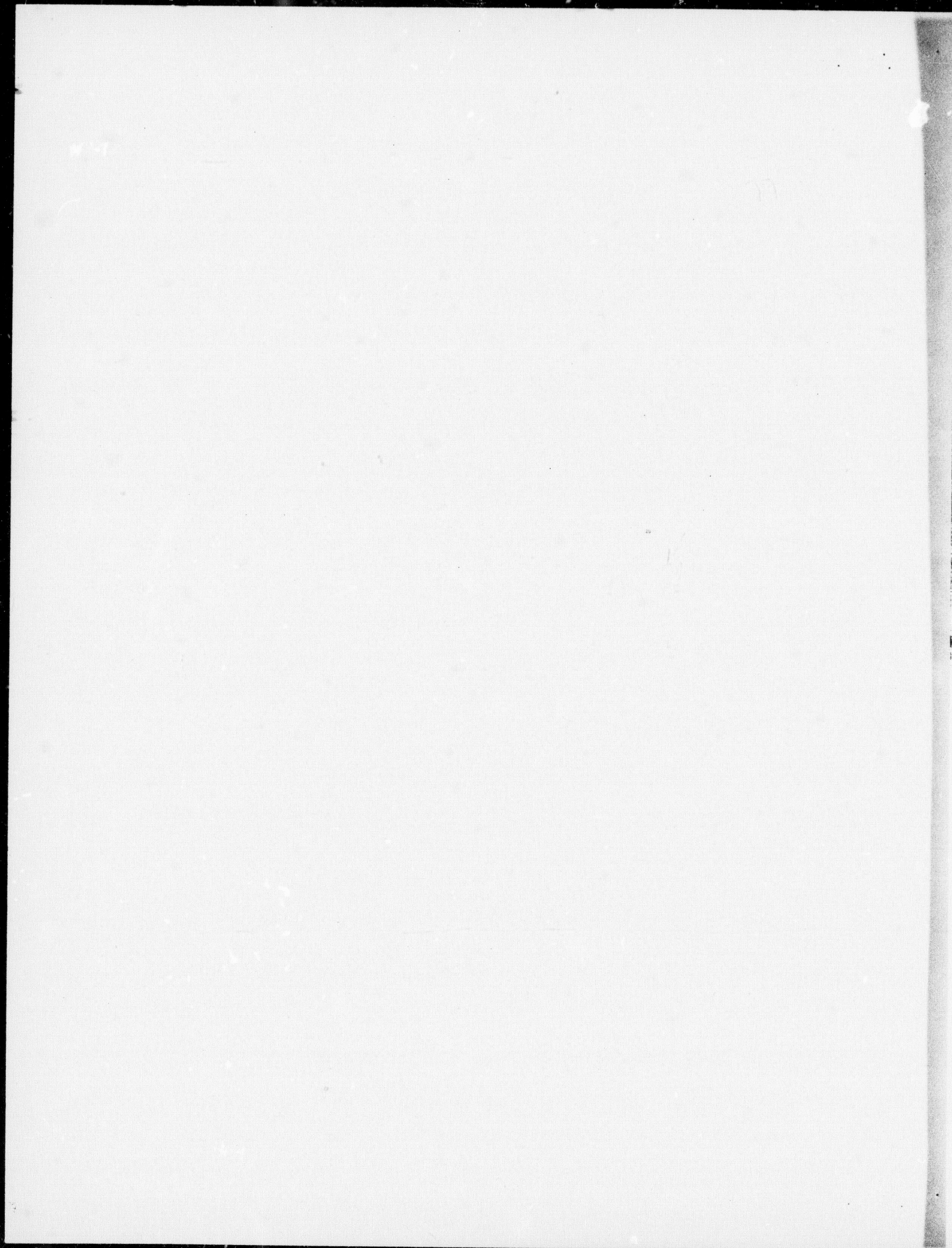
D. Conclusion

Nothing before the District Court gives assurance that the poison of Keno's criminality did not infect any of the other jurors.

As Remmer makes clear, no evidence presented ex parte by the Government can properly be considered in making a factual determination in a case like Moten's. For the instant motion, evidence in the Government's sealed records is of no consequence whatsoever.

That leaves only the Government's voir dire as assurance that the jury's verdict was not tainted. When the District Court conducted that voir dire, it is not clear that the Court knew that Yolanda Intersimone had seen Keno with another juror. The important inquiry about that fact was never made.

Moreover, if the jury had become tainted by the time the voir dire was conducted, this modest perfunctory interrogation could neither cure nor disclose prejudice. In those few instances when a juror did make an ambiguous remark,



the District Court pursued the matter no further. (F-4222,8).

To deny the Appellant the opportunity to inquire of the scope of Keno's wrongdoing when these are the only assurances is clearly improper.

POINT II

THE APPELLANT HAS MADE A SUFFICIENT EVIDENTIARY SHOWING TO BE ENTITLED TO DISCOVERY.

The District Court's finding that Appellant submitted evidence insufficient to justify a hearing does not justify the Court's refusal of discovery.

A. The Evidence Presented to the District Court Establishes The Likelihood That Juror Interviews Will Yield Relevant Testimony.

In the preface to its opinion, the Court noted the evidence presented:

There is before me (1) a tape recording of an unsworn post-trial interview of the forelady of the jury, Ms. Isabelle Blau... (2) a two-page unsworn, handwritten statement by Ms. Blau; (3) an inconsequential affidavit by Ms. Blau; (4) an affidavit by Investigator Maline that does no more than provide a chronology for the Blau submissions; and (5) hearsay affidavits by Intersimone's trial attorney David Keegan, and Moten's appellate attorney, Ivan Fisher.

D-3

Concluding that the lawyer's affidavits were the "only basis" for Appellant's motion ignores the probative value of the other submissions listed above. Each item, except No. 4, contains evidence supportive of Moten's allegation.

Ms. Blau's Taped Interview

Ms. Blau's taped interview contains observations that, when compared with other known facts about the Keno affair, corroborate Moten's basic allegation that Keno did not act alone.

For instance, the District Court fails to perceive that a passage it quotes in its opinion is susceptible of interpretation contrary to that of the Court. Ms. Blau asserts that jurors No. 2 and No. 8 were prejudiced against Alvarez, and allegedly recounted newspaper reports containing prejudicial information about Alvarez. The District Court relied on this account to hold that, even if these allegations were true, Moten would suffer no prejudice because the two El Diario articles, allegedly made known to the jury, contained little information not already presented at trial.

Interpretations contrary to that of the District Court are possible. First, the Court assumes the only two articles in Spanish-speaking newspapers discussing the Moten trial were El Diario articles. The Court reached this conclusion, notwithstanding Ms. Blau's remark -- based on her recollections of the jurors' statements -- that "I'm sure they were probably in the Spanish press quite frequently during the trial." (D-6) Ms. Blau's recollection that the Hispanic jurors "frequently" reported, or appeared to report, newspaper accounts contradicts the Court's determination that the prejudice likely to result to Moten could be evaluated exclusively on the basis of the two known El Diario articles. This discrepancy creates an appropriate subject for juror interviews.

Assuming arguendo, that the El Diario articles are the only significant articles appearing in local Spanish-speaking newspapers, Ms. Blau's statements suggest that the Hispanic jurors knew much more about Alvarez than they could possibly have culled from those two articles. Ms. Blau, speaking of the Hispanic jurors and their relation to Alvarez, said:

They knew all about him...and I said, you musn't read newspapers, but they knew already. How hated, I mean they hated, he was a bad, a black mark in their seed. And they really knew the whole story about Juan Alvarez, you see.

That, ah, in the newspapers, ah, I guess in this newspaper.

Yes, ah, I'm sure they probably in the Spanish press quite, ah, quite frequently during the trial.

No, no, they wanted him to be found guilty... they must have gotten alot of the data from the paper, you know.

D-6

Ms. Blau's statements indicate the Hispanic jurors knew more about Alvarez than the El Diario articles contained. Ms. Blau's impression that these jurors knew unusually much about Alvarez contradicts the Court's finding that, since the El Diario articles reported no significant information not presented at trial, no prejudice could result. It is impossible to reconcile Ms. Blau's impression, that the Hispanic jurors knew much more about Alvarez than any of the other jurors, with the Court's

conclusion that these two jurors, even if they did disclose extraneous information, could not have reported anything not already known by the jury.*

These inconsistencies, arising from known improprieties by the Hispanic jurors, raised a troubling question. To wit: what, or who, was the source of the information about Alvarez possessed by jurors No. 2 and No. 8. The possibility exists -- and it is hardly a fantastic one -- that No. 2 and No. 8 learned "the whole story about Juan Alvarez" from some of his co-defendants at meetings held during the trial. Or, in the alternative, they knew nothing about Alvarez but were fabricating these stories in order to prejudice the jury.

This possibility exists, is corroborated by existing evidence. That is all that is necessary as a preliminary showing on the instant motion to discover.

Moreover, these insights are grounds for precise questioning of the Hispanic jurors as to the source of their knowledge; and of the other jurors as to the disclosures allegedly made by No. 2 and No. 8 concerning Alvarez or others. Thus, there is a clear

* The Blau tape additionally contains the allegations contained in her sworn affidavits, discussed infra.

"likelihood" of discovering "competent evidence admissable at a hearing on a motion for a new trial," Miller v. United States, 403 F.2d 77 (2d Cir. 1968).*

Ms. Blau's Statement and Affidavit

Ms. Blau's handwritten statement, and the sworn affidavit reciting similar facts, report her recollection that juror Keno was "seen together frequently during lunch recess" with jurors No. 2 and No. 8, the two other Hispanic jurors, and that, immediately after juror Keno was dismissed, an unmistakable rapport that existed between them came quickly to an end.

These assertions corroborate Moten's allegation that jurors other than Keno took part in, or at least knew about, his efforts to corrupt the jury at the Appellant's trial. By Yolanda Intersimone's report, Keno was in the company of another juror immediately before and after his attempt to convey his message to the defendant Intersimone.

Ms. Blau's statements provide the predicate for questions

* Neither Appellant Moten nor his attorneys participated in the arrangement for, or the conduct of Ms. Blau's interview. In fact, Appellant gained access to a tape of that interview only by obtaining an order from the District Court requiring its production by Intersimone's attorney.

that could be addressed to all those sitting on the jury that convicted Frank Moten. Specifically, each juror could be asked whether on Friday afternoon, September 27, 1976, they had seen Keno in the company of the two Hispanic jurors. The jurors could be asked, additionally, whether Keno and the Hispanic jurors were so constantly in each other's company that, at the least, there was a substantial likelihood that either juror No. 2 or No. 8 was with Keno the day he approached Yolanda Intersimone. Finally, jurors No. 2 and No. 8 can be directly questioned as to whether they were in Keno's company that day.

Similarly, Ms. Blau's report -- that, after Keno's dismissal, the previously close relationship between jurors No. 2 and No. 10 appeared to disintegrate -- strongly suggests that these jurors were adversely affected by the discovery of Keno's encounter with Ms. Intersimone. If true, this fact clearly supports an inference that they either knew of, or were part of, Keno's venture.

Finally, Ms. Blau discloses that the two Hispanic jurors were "outrageously vigorous in favor of Bernard Brightman's conviction." (B-5). This fact, must be considered in light of prior disclosures to the District Court that Brightman apparently had attempted to enlist Intersimone's cooperation in bribing a juror of whom Brightman had learned that "there was a possibility of reaching." (E-3).

The conjunct of these two isolated bits of evidence -- particularly if the Hispanic jurors' disposition toward Brightman, in addition to being at odds with that of their co-jurors,* was so radically different from that they displayed toward other defendants -- supports an inference that jurors No. 2 and No. 8 knew of Brightman's willingness to tamper with the jury; and that they either relied on that knowledge as extra-judicial evidence of Brightman's guilt, or -- assuming they were Keno's confederates -- decided to do whatever possible to convict Brightman in order to allay any suggestions of impropriety that might arise if the connection between Brightman, Keno and them ever became a matter of public knowledge. In either case, Ms. Blau's allegations establish the probability of a then existing relationship between Brightman and jurors No. 2 and No. 8. Beyond peradventure of doubt, the existence of such a relationship is a proper subject of inquiry on Appellant's instant motion for a new trial.

Ms. Blau's last observation is the subject for legally competent testimony. Presented only as circumstantial evidence of external influences on the jury's deliberations, it is

* As to Bernard Brightman, the instant jury reached no agreement and failed to return a verdict. On subsequent retrial, Brightman was acquitted.

admissible under Mattox v. United States, supra. Certainly, if testimony that tends directly to establish the existence of such influence is admissible as evidence of that fact, testimony tending indirectly, or circumstantially to prove the same fact must likewise be admissible.*

Questions of competency aside,** the District Court seemed not even to have recognized that Ms. Blau's statements contained any relevant probative allegations of fact. All three representations disclosed above appear in the sworn affidavit the District Court dismissed as "inconsequential." (D-3). The District Court erred in so concluding.

* See Appellant's more detailed argument on this issue, infra.

**Even if Ms. Blau's testimony as to these facts is incompetent at a hearing, it is not obvious that it should not have been considered vis a vis a request for discovery. The Appellant, in effect, attempted to establish that he had probable cause to interview jurors. Competency of evidence is seldom a requirement at other similar proceedings. For instance, when applications are made for search warrants, and the only question is whether the Government has established probable cause to search for evidence, the police are entitled to rely on hearsay affidavits. Similarly, otherwise incompetent evidence can be introduced to the Grand Jury.

The Attorney's Affidavits

Intersimone's trial attorney and the Appellant's present attorney have submitted affidavits containing allegations that jurors other than Keno were involved in, or knowledgable of, efforts to tamper with the jury at the Appellant's trial. (A-4, B-7) See p. 13, infra. The District Court, incorrectly describing these affidavits as the "only basis" for Appellant's motion, held that, because they contained only hearsay, these affidavits were "insufficient to call for a hearing." (D-3,4).

For several reasons, the District Court's ruling is erroneous. First of all, these affidavits, although their most critical allegations are reports of statements made by others, present for the District Court's consideration only statements made under circumstances that impart very substantial indicia of reliability. See discussion, supra, p. 13. The District Court, by premising its ruling solely on the basis that the affidavits contained hearsay, failed to recognize that the existence of such indicia is a basis for the admission of otherwise inadmissible hearsay evidence. United States v. Puco, supra. That rule must be applicable here because it is highly improbable that such allegations would be presented unless the lawyer affiants were confident that once required to appear before the Court, the persons

who made these statements were capable of testifying accordingly.

Secondly, the District Court, in light of statements made by itself and the Government, cannot reasonably premise its ruling solely on the grounds that the Appellant relied upon hearsay affidavits. For instance, in a colloquy among the District Court, Mr. Beller and Mr. Fisher, as to the significance of Ms. Blau's observation that three Hispanic jurors, including Keno, frequently lunched together, this exchange took place:

The Court: There were three of them...the three of them of Hispanic background, was that the way she put it...

Mr. Beller: She says that 2, 8, and 10 use to go...

The Court: They were luncheon companions with each other. The mere fact he may have been walking on Broadway with 2 and these two arguably who talked to Yolanda Intersimone doesn't seem to me to be a basis for talking to anybody and she doesn't even know whether it's 2 or 10, she very forthrightly said at one point when it was reported to me she wasn't prepared to identify who it was. (D-31) (emphasis supplied)*

* The appellant notes that during this colloquy numbers used to designate the jurors were repeatedly confused. Juror Keno was actually juror number 10. (D-31). Nonetheless, it is clear that, in using these numbers, the District Court was referring to the two Hispanic jurors other than Keno.

The District Court's last remark is ambiguous, but it clearly makes one of two assertions. If, when the Court spoke of Ms. Intersimone's statements "when it was reported to me", it was stating its recollection of the in camera conference held on September 20, 1976, when Ms. Intersimone initially informed the Court of Keno's approach to her, then the District Court was corroborating the hearsay affidavits presented on Moten's behalf.

The fact that another juror was with Keno on the day Keno attempted to convey a message to the defendant Intersimone, is a fact central to the Appellant's allegations. Indeed, the Appellant has unsuccessfully sought discovery of the transcript of the Court's interview with Ms. Intersimone, but that proceeding remains sealed. The quoted remark suggests that the District Court had already learned from Ms. Intersimone that, although unable to identify which juror she knew, that some juror was with Keno that day. If that is so, the Court was in possession of evidence corroborating Keegan's hearsay allegation as to Ms. Intersimone's certainty that another juror was with Keno. If it had access to this evidence -- and if that evidence corroborated the Appellant's allegations -- then the Court improperly premised its ruling on the insufficiency of his hearsay affidavits.

Alternatively, the District Court's remark discloses an inability, or an unwillingness, to perceive the significance of the facts alleged by Moten. By asserting that the nearby presence of another juror with Keno when he approached Ms. Intersimone "doesn't seem to me to be a basis for talking to anyone". The Court discloses that -- even if Moten had been able to present Ms. Intersimone's affidavit, instead of Mr. Keegan's affidavit reporting Ms. Intersimone's statements, -- these allegations would have no significance.

The Appellant respectfully submits that the Court errs in so concluding. The presence to another juror with Keno at the time strongly suggests that this other juror was aware of, or party to, Keno's efforts to solicit a bribe. If the District Court doubted the relevance of these allegations, the credibility of its related conclusions that "nothing helpful to Moten" was to be found in the sealed records of the Keno prosecution (D-2) it becomes subject to considerable doubt.

The Government also appears to have acknowledged that Ms. Intersimone's prior statements to the Court on September 20, 1976 corroborated Mr. Keegan's hearsay declarations. In opposition to release of the sealed transcripts of the Court's in camera interview with Keno and Yolanda Intersimone, the

Government made these remarks:

Just so our response is clear Your Honor.

As Mr. Keegan pointed out in his affidavit, Mrs. Intersimone did at various times make certain statements, I don't believe that since the defendants already know about these statements- I gather that that's not part of the request.

In any event, we are not going to turn these over. We believe we are not required to turn these over since what she stated with respect to other jurors is already contained in the affidavit... (H-19) (emphasis supplied)

In this statement, the Government impliedly asserts that these sealed transcripts, as yet unavailable to the Appellant, corroborate the proffered hearsay accounts of Ms. Intersimone's statements and that Ms. Intersimone actually made these statements. The Government's argument that it was not necessary to disclose any sealed transcripts because "what she stated with respect to other jurors" was already described in Mr. Keegan's affidavit, is clearly not a denial of these allegations.

This argument appears to be nothing more than a statement that Appellant is not in need of discovery, because the Appellant already knows everything contained in the Government's records.

The Appellant, of course, has no access to these sealed records, and thus is unable to determine whether these

records corroborate . . . legations. These admittedly ambiguous statements by the Court and by the Government -- particularly when coupled with the Court's opinion that the crucial fact whether Keno had a juror companion on September 17, 1976, had no significance -- creates some doubt as to whether existing Court records corroborate the Appellant's allegations. If that is true, it is proper to dismiss the Appellant's motion only because the affidavits in support thereof contain only hearsay. At the very least, the Court should hold an adversary proceeding to compare the Appellant's affidavits with the Government's records containing the relevant statements of the declarants.

Finally, the District Court erroneously criticizes Appellant's reliance on hearsay affidavits, because the declarants "were clearly within the reach and control of counsel" (D-3).

The Appellant respectfully notes that, in support of the instant motion, he alleges the existence of a criminal conspiracy to tamper with a jury. If such a conspiracy act existed, it is highly improbable that the alleged participants, or their relatives, in that illegal venture would voluntarily submit sworn affidavits to the District Court.

Two incidents illustrate the preceeding proposition. During the Government's investigation of Keno, Intersimone's trial attorney, David Keegan, was subpoenaed to testify before

the Grand Jury concerning his previous disclosure to the District Court implicating his client in an attempt to tamper with the jury. (E-3). Presumptively at this client's insistence, Keegan invoked the attorney-client privilege, until this Court held that the privilege did not protect the communications that were the subject of the Grand Jury's inquiry. In re: Grand Jury Subpoena, supra. If Moten's co-defendant would go to such lengths to thwart a Government inquiry, he is not likely to contribute readily to the factual showing essential for the success of this motion.

Additionally, when the Appellant learned that Intersimone's then attorney, Mr. Bergman, had conducted an interview with the jury's forelady, Ms. Blau, the Appellant was able to gain access to a tape recording of that interview only after obtaining a court order requiring its production.

In light of these two incidents, and in light of the potentially incriminating disclosures the District Court apparently requires as part of a showing sufficient to justify discovery, the Appellant submits that the Court's emphasis on his inability to produce non-hearsay affidavits was clearly improper. This consideration coupled with Appellant's lack of access to Government records that could possibly corroborate his allegations, clearly demonstrates that the District Court erred in refusing to entertain Appellant's hearsay affidavits as the basis for the instant motion.

B. The Appellant Seeks to Interview Jurors Only As To Matters About Which They Are Competent To Testify.

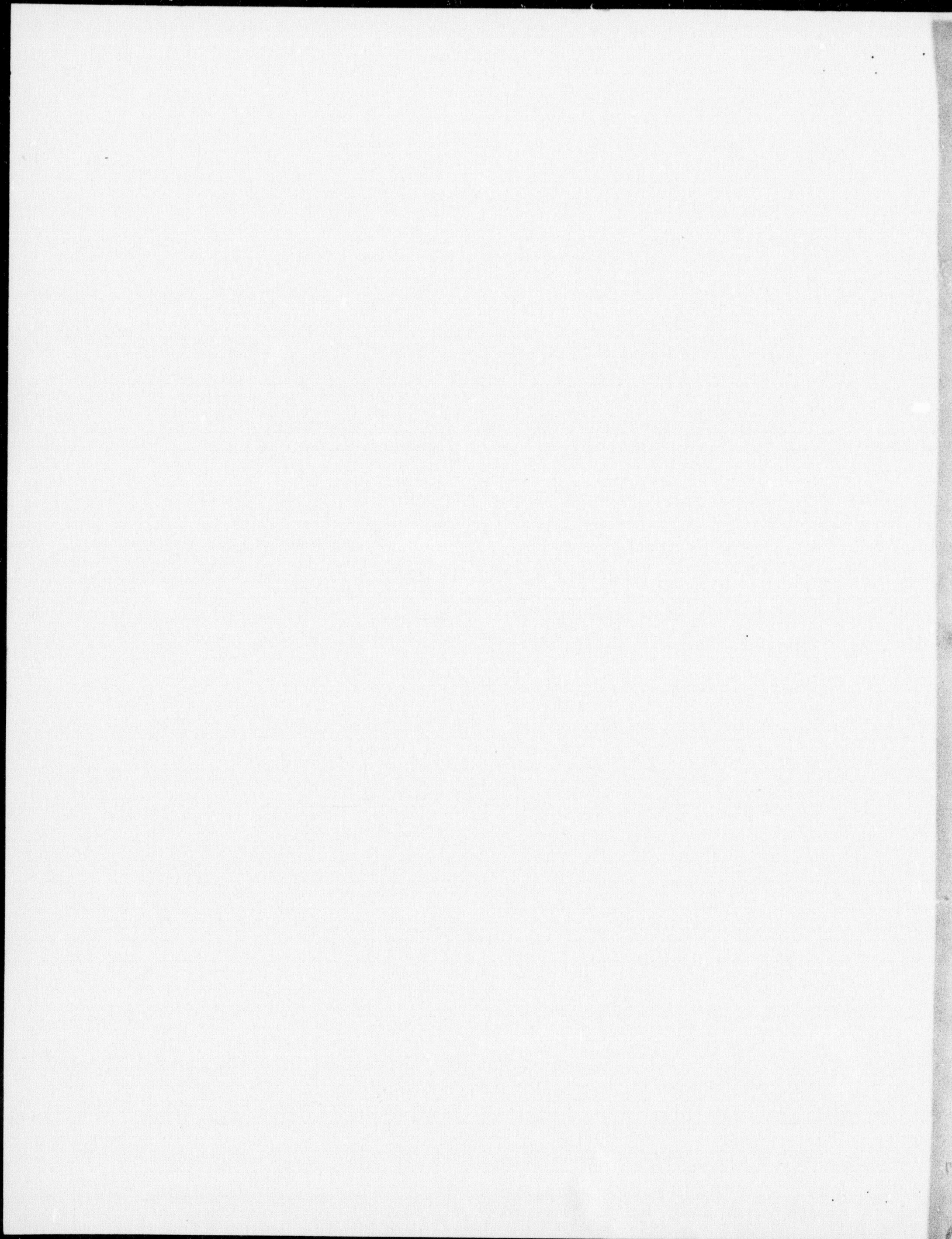
The Appellant's only purpose in attempting to interview jurors is "to develop new evidence admissible under the rules governing impeachment", Miller v. United States, supra, at 84.

Jurors, although ordinarily incapable of giving competent testimony impeaching their verdict, are competent to testify as to the existence of extraneous influences upon the jury's deliberations. "A juror may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated on his mind". Mattox v. United States, 146 U.S. 140, 149 (1892).

These influences need not be brought to bear on the entire jury. Even if only one juror becomes thus corrupted, the jury's entire verdict is tainted. Cf. Parker v. Gladden, 385 U.S. 263 (1966); United States v. Pleva, 66 F.2d 529 (2d Cir. 1933).

When there are allegations, established at least to the extent there is good cause to believe, that a juror has been bribed, the evidentiary rule articulated in Mattox must be construed to require that a juror's testimony be competent regarding events -- both inside and outside the jury room -- as long as the testimony tends to show that some juror has taken a bribe.

The juror's testimony, even if it relates to events



that occur in the midst of deliberations would be competent because it is offered only to show the existence of an extraneous influence -- not its impact upon the juror. Clearly, if a juror suspected that one of his co-jurors had been bribed by a defendant, that juror would be able to distinguish between the facts giving rise to that suspicion and the effect those same facts may have had upon juror's deliberations.

Ms. Blau's affidavit, discussed supra, is thus an example of the type of testimony that Appellant could properly anticipate receiving from jurors. As argued supra, in light of the District Court's knowledge that Bernard Brightman allegedly knew jurors who were willing to be bribed, Ms. Blau's assertion that two Hispanic jurors fought "outrageously" for his conviction was material evidence, relevant and competent only to the extent that it tended to establish a connection between Brightman and these two jurors.

The Hispanic jurors' vote stands out, particularly because the jury of which Ms. Blau was a member failed to agree upon a verdict for Bernard Brightman. When the Government reprosecuted Brightman, he was acquitted. Testimony that these two Hispanic jurors argued so vigorously for Brightman's conviction in the face of substantial disagreement suggests the possibility that they had an extra reason to seek a guilty verdict. Ms. Blau's statement supports an inference that these

two jurors, once Keno's confederates, later adopted a hostile stance towards Brightman in order to avoid the appearance of an impropriety hinting at their previous alliance with Keno and Brightman.

This last conjecture -- as the Court must readily perceive -- is the sort possible only at the periphery of the Mattox rule. Appellant notes that not all, and presumably little, of the interviews he seeks would necessarily focus on matters so inextricably related to the jury's deliberations.

Nonetheless, the Appellant respectfully submits that such inquiries fit, if snugly, within the limits of competent testimony. This testimony must be competent if the rules of evidence are not to thwart the now-established policy that the jury verdicts prejudicially tainted by external influences are not valid, and if invalid, must be discovered.

The traditional rule declaring the competency of jurors to impeach their own verdicts has bowed before such necessity. In Clark v. United States, 289 U.S. 1 (1933) (Cardozo, J.), the Supreme Court, in a criminal contempt proceeding against a former juror who perjured herself by concealing her prior acquaintance with a litigant, upheld the admission of testimony concerning this juror's total lack of impartiality during jury deliberations. The Court argued that this juror had no entitlement

to the traditional privileges enjoyed by jurors:

We think the privilege does not apply where the relation given birth to it has been fraudulently begun or fraudulently continued...the privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not envoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth.

The Court continued:

In saying this we do not mean that a mere charge of wrongdoing will avail without more to put the privilege to flight. There must be a showing of a prima facie case insufficient to satisfy the judge that the light should be let in. Upon that showing being made the debates and ballots in the jury room are admissible as corroborative evidence supplementing and confirming the case that would exist without them. Let us assume for illustration a prosecution for bribery. Let us assume that there is evidence direct or circumstantial that money has been paid to a juror in consideration of his vote. The argument for the petitioner, if accepted, would bring us to a holding that the case for the people must go to the triers of the facts without proof that the vote has been responsive to the bribe. This is paying too high a price for the assurance to a juror of serenity of mind.

Supra, at 14. (emphasis supplied)

While Justice Cardoza's illustration concerns a prosecution for bribery, it applies with equal force to the instant case.* Admittedly, Clark distinguishes between a juror's

* Insofar as Clark indicates that the Government in the Court's investigation of the Keno incident could have inquired into the jury's deliberations, the opinion supports Appellant's position solely on equal protection grounds.

privilege and "something very different, the competency of witnesses to testify in impeachment of a verdict", supra, at 13. However, none of the policy arguments offered in justification of the opinion in Clark suffer by application to the instant case.

In support of it's opinion in Clark, the Court turned to the lawyer-client privilege:

We turn to the precedence in the search for an analogy and the search is not in vain. There is a privilege protecting communication between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advise that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.

Supra, at 15.

The same analogy is apt in the instant case. As long as a juror acts within the scope of his duties, he is entitled to the protection afford by the traditional evidentiary rule preventing jurors from impeaching a jury verdict. Once, however, a juror exploits his special status improperly and becomes a party to, or knowledgeable of, outside attempts to tamper with the jury, he acts outside the scope of his privilege. Such a juror cannot then rely on his status as a juror to thwart inquiry. Moreover, those jurors who have not participated in any wrong-doing cannot -- assuming the improbable likelihood that they would -- object to a properly conducted investigation

of alleged bribery. Post-trial inquiry of jurors is prohibited from delving into the process by which the jury came to its verdict. So long as the jury remained within the outer bounds of propriety, it ought not suffer any inquiry. The jury has a stake in safeguarding the secrecy of its prior valid labors. But once that secrecy has been breached, the jurors -- as well as the litigants -- have an equal stake in discovering and redressing any outside interference.

No juror could have an interest in claiming a privilege under these circumstances. Whatever privilege is enjoyed by jurors is not at all like the Fifth Amendment privilege against self-incrimination. It is not designed to protect individual members of the jury from all inquiry.

This jurors' privilege, while it may have similar historical antecedents 289 U.S. at 16-17, is not intended to be used as a shield by jurors to insulate their wrongdoing from inquiry. The privilege is intended to, and is valid only to the extent to which it can, safeguard the uncorrupted use of an institution essential to our system of jurisprudence.

The Appellant respectfully submits that the Supreme Court's opinions in Clark and Mattox together yield the proposition that the privacy of jury deliberations will be protected to the extent that no party can ordinarily interfere with that privacy;

but that once such interference has occurred, jurors can be expected -- and properly can be asked to cooperate -- in divulging whatever information is needed to discover the identity, or indeed the simple fact, of outside influences tampering with that jury.

Or again, in the words of Justice Cardozo:

...we recur to the social policies competing for supremacy. A privilege surviving until the relation is abused and vanishing when abuse is shown to the satisfaction of the judge has been found to be a workable technique for the protection of the confidences of client and attorney. Is there sufficient reason to believe that it will be found to be inadequate for the protection of the juror? No doubt need is weighty that conduct in the jury room shall be untrameled by the fear of embarrassing publicity. The need is no less weighty that it shall be pure and undefiled -- [other concerns] must yield to the over-mastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption.

Supra, 289 U.S. at 16. (emphasis supplied)

See also, United States ex rel Owen V. McMann, 435 F.2d 813 (2d Cir. 1970); and Southern Pacific Co. v. Klinge, 65 F.2d 35, 88 (10th Cir) cert. denied, 290 U.S. 657 (1933).

C. The Appellant Seeks Only The Full Inquiry Of The Keno Affair That Has Yet To Be Conducted.

The Appellant has offered to comply with all reasonable restraints imposed by the District Court (H-27), and has to this date complied with the Court's order barring contact with former members of the jury. This offer, and observance of limitations

imposed by the District Court precluded abuse of the privilege to interview jurors post-trial such as this Court condemned in Miller v. United States, supra. See also, United States v. Driscoll, 276 F. Supp. 333 (S.D.N.Y. 1967).

Appellant now attempts only to make a necessary inquiry at a time when possible prejudicial influences on the jury's deliberation can be investigated without fostering prejudice that might not otherwise have existed.

In making this application, Appellant took heed of this Court's suggestions in United States v. Gersh, 328 F.2d 460, (2d Cir. 1964). During the trial in Gersh, a witness and the jury's forelady received a series of anonymous phone calls.* The forelady, after informing the Court of these calls, was instructed not to mention them to other jurors.

The Government disclosed these events only in response to the defendants' opposition to their remand immediately following the return of the jury's verdict. No question of jury taint was then raised before the District Court. For the first time on appeal, the defendant alleged that he was entitled to a new trial. This Court, in upholding

* Whoever made these telephone calls never actually spoke to either the witness or the forelady, but instead, hung up as soon as either picked up the receiver.

, the District Court's refusal to order a new trial, remarked:

Save when the conceded facts as to the outside contact with the juror conclusively show prejudice, the Court is not bound to order a new trial, but rather to conduct a hearing in which the facts can be established, with the Government having the burden of showing that any such contact was harmless to the defendant.

Supra, at 464 (emphasis supplied).

Thus, where the existence of a potentially prejudicial contact with the jury was not contested but where the resulting prejudice, if any, had yet to be determined, the defendants overestimated their entitlement to relief. Had they been content to inquire first as to whether they were entitled to relief, the Government would have borne the burden of disproving prejudice. In Gersh, the defendants lost their chance by overreaching.

Moten makes no similar mistake. His motion for relief is a motion for discovery, under Court supervision if necessary, as to whether any of the jurors can give testimony corroborative of Appellant's not unfounded allegation that other members of the jury that convicted him know of, or actually participated in, Keno's adventure.

The Government alleges, and the District Court appears to hold, that no evidence of a potentially prejudicial fact is to be found in the record. The District Court insists that its cautious

and necessarily attenuated mid-trial voir dire of jurors conclusively shows that Keno's ill-fated attempt at jury tampering was a solitary venture.

The District Court's voir dire is most conspicuously deficient in that, because of the critical phase of trial when Keno's exploits were discovered, the Court was unable to ask the one question that absolutely had to be answered if the factual predicate underlying Moten's instant motion were to be conclusively established or disproved.

No juror was asked whether they had seen one of their co-jurors speaking to outsiders. No juror was asked whether they knew, or had reason to believe, that any other juror was communicating with others outside about the then pending trial.

The District Court asked only two questions during its voir dire:

Whether anyone has spoken to you or tried to speak to you about the case in any way at all, and whether the jury [sic] has spoken to each other about the merits of the case in any way at all.

F-4211.

This limited inquiry was designed to accomplish limited purpose. The District Court's limited concern was clearly

expressed:

I do not wish to go so far in the asking of the questions as to make an affirmative suggestion to any other juror that anything has been afoot from defendants or counsel or anyone else, but that's the inference they might well draw if one gets too deep.

F-4195, (emphasis supplied).

Moten's trial attorney asserted:

"the very delicate problem we have now is how to keep the rest of the jury from being affected with the suggestion that there was something inappropriately done with respect to one of their fellow jurors. (F-4198)

Thus, all participants in these proceedings shared a common objective to 'minimize the impact of what's happened today' and to 'pass the matter as lightly as we can'." (F-4205)

In light of this overriding concern, it was impossible to ask the jurors one clearly important question. To wit: Do you know, or do you have any reason to believe, that any other juror has been discussing this case with persons outside the jury?

Only this question should have permitted the District Court to corroborate, or fail to do so, Yolanda Intersimone's report that Keno was with another juror on the Friday afternoon when he approached her. At least twice during the Court's voir dire, examples of the limitations inherent in the Court's "two

question" format appear in the voir dire of Mr. Perez, juror No. 8, one of the Hispanic jurors who was allegedly Keno's lunchtime companion, this dialogue took place:

Q: Has the jury been talking amongst itself about the merits of the case as I would call it?

A: Not that I know, sir.

Q: Alright. Anybody else talk to you about the case?

A: No sir.

Q: Or tried to talk to you about the case?

A: No, sir, not to me.

F-4228, (emphasis supplied).

A defense attorney, not hampered by the fear of prejudicing a jury, would have instinctively asked in response to Mr. Perez' last remark, "well, if not to you, then to others?"

A similarly ambiguous response made during the voir dire of Mr. Crespol, juror No. 2, and the other Hispanic juror, should have provoked inquiry:

Q: ...have any of you jurors been discussing the merits of this case amongst each other?

A: No.

Q: You have not?

A: No. We have been talking about something else.

F-4222, (emphasis supplied).

At the hearing on this motion, Moten's attorney, after quoting the above exchange, commented:

I assure Your Honor, if I were there I would have found out if I could, if the Court would have permitted, what the something else was. What they were all talking about. But that's an example of the difference between then when Your Honor is in the middle of a trial, when Your Honor has other interests to protect, and now.

To this, the Court responded:

The something else is of no interest to me. (H-44)

Notwithstanding the fact that further inquiry into juror No. 2's remark might have yielded important information, that inquiry could not have been conducted on the voir dire. The need to avoid tainting a jury, at that time presumptively capable of returning a fair verdict, justified this limited voir dire.

The same justification does not excuse the Court's refusal to allow Moten's post-trial investigation. See United States v. Gersh, supra, in which this Court recognized a defendant's right to examine jurors post-trial about possible outside influences affecting their deliberations, disclosed to defendants only at a time when their attention was focused on other issues.

While the defendant's attorneys here learned of Keno's exploits early enough in the trial to protest, their attention was

then focused on a much more pressing problem -- how to prevent a mistrial, or in the alternative, how to prevent the jury from becoming prejudiced as a result of the Keno incident. It is hardly fair to fault the defendants for the cooperative attitude they displayed during this difficult episode.

Both the Government and the District Court failed to perceive that the in-trial voir dire was not a thorough hearing. The Government, speaking of the Appellant's discovery request, insisted that the Appellant was requesting only the "hearing that the Court has already conducted." (H-49). Speaking in opposition to co-defendant Intersimone's similar request, the Government asserted "at that time all of the participants, and I mean defendants, and their counsel, believed that the inquiry had gone far enough if not too far." (G-22).

While Mr. Beller's remark is not false, it is misleading. When the attorneys representing Moten and his co-defendants attempted to limit the District Court's voir dire, they were concerned that that least intimation that Keno had been improperly approached would prejudice the jury. (F-4198, 4204, 4209). The defendants feared, not that the District Court would discover too much on voir dire, but that in the process of discovering nothing, the Court would cause irrevocable prejudice.

The District Court recognized this dilemma in it's opinion, but unfortunately misjudged its significance for the instant motion:

If defendants were dissatisfied with my examination of jurors at the time, that had a duty to speak then. They could not "gamble on an acquittal while holding this response in reserve." United States v. Gersh, 328 F.2d 460, 463 (2d Cir.) cert. denied, 377 U.S. 992, (1964).

Reliance upon Gersh here is misplaced. The defendants took no gamble. Their only options then were to force a mistrial or to insist on a voir dire calculated to least prejudice themselves before the jury. Opting for the latter is no gamble.

Certainly, neither the appellant nor his co-defendants knowingly waived their right to conduct a more thorough inquiry. When the scope of this voir dire was discussed before the District Court, no defense attorney -- except perhaps Mr. Keegan -- knew the details of the encounter between Keno and Yolanda Intersimone. When the District Court solicited the defendant's opinions about the scope of his voir dire, he informed them only that:

Now, at the beginning of the morning, it was brought to my attention that there was a possible attempt by a juror to approach a defendant in this case to get a message to that defendant. ...I have excused that juror. It is juror number 10. It was also brought to my attention, rather, information was brought to my attention that one defendant in this

case about the possibility of reaching a juror.

(F-4194).

That is the entirety of the District Court's disclosure concerning the grounds necessitating the voir dire that soon followed.* Given this limited information, none of the defendants had adequate notice of the possibility that other jurors knew of the effort by Keno to contact one of their number. Even the District Court subsequently recognized that "they (defense counsel) were unaware that a juror had made an impermissible approach." (H-43).

The Appellant respectfully submits that, in light of his willingness to comply with reasonable constraints imposed by the District Court, and in light of the inadequacy of the Court's own prior inquiries, and in light of the substantial likelihood that competent, relevant evidence could be obtained from the jury, he should be permitted to interview those jurors who returned a verdict of guilty against him.

* When pressed by defense counsel for a more elaborate explanation, the District Court responded: "Let me not get into this any deeper than I need in order to run this trial to conclusion and at that time you may be advised of the promise." (F-4197).

POINT III

THE GOVERNMENT HAS THE BURDEN OF JUSTIFYING THE SEALING OF PROCEEDINGS INCIDENT TO THE KENO PROSECUTION.

The Appellant is entitled to disclosure of all the Government's records incident to the Keno prosecution, absent a showing that this continued secrecy is necessitated by some compelling need of the Government.

All Appellant's arguments presented in Point I and Point II implicitly support the instant proposition. The Appellant Frank Moten has demonstrated that the Government's records are vitally necessary to enable Moten to effectively prosecute his motion for a new trial in the District Court; and has demonstrated further that his allegations are not frivolous.

Given the substantial interests at stake -- both to Frank Moten and to the integrity of the criminal justice system -- the Government cannot merely assert an absolute privilege to retain these records.

Given the context in which the instant discovery motion arises, a rule derivative of that in Remmer v. United States, supra, is appropriate. Assuming the Government has diligently prosecuted the Keno affair, it is presumptively

in a position to verify or disprove the Appellant's allegations.

The Appellant should not be denied a request for discovery that will almost inevitably raise definite factual issues necessitating a hearing by the trial court. The Government, which has never taken an official position one way or the other concerning the Appellant's allegations (C-1, H-19), cannot escape determination of important factual issues merely by refusing to speak.

CONCLUSION

For the foregoing reasons, the Appellant is entitled to the entirety of the relief he requests.

Respectfully submitted,

IVAN S. FISHER
Attorney for Appellant
Frank Moten
400 Park Avenue
New York, New York 10022
(212) 355-2380

JOSEPH H. ADAMS
Law Clerk